

## **Exhibit F**

### **John Barrett Deposition Excerpts**

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1 Q. And can you talk about that company's  
2 business a little bit.

3 MR. JONES: Objection to the form of the  
4 question.

5 Q. (By Ms. Besl) You can answer.

6 A. Huh?

7 Q. You can answer. So --

8 A. We're a marketing research firm.

9 Q. Okay. Marketing research firm.

10 And just also to explain a little bit, at  
11 times, your counsel will make objections. Unless he  
12 specifically instructs you not to answer, once he's  
13 done -- kind of a legal thing the attorneys like to  
14 do is object -- you can feel free to answer when he's  
15 done. I think -- Understand?

16 A. Uh-huh.

17 Q. Perfect.

18 A. Is there a quota?

19 Q. No. Though Neil, I think has a goal every  
20 deposition but --

21 MR. JONES: I don't.

22 THE WITNESS: That's fine.

23 Q. (By Ms. Besl) All right. So you  
24 mentioned you're a marketing consulting firm?

25 A. Yes. We are.

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1 Q. Okay. And does Consensus Point have any  
2 focus on litigation consulting specifically?

3 A. None.

4 Q. None.

5 A. Unless requested.

6 Q. Unless requested. How often is litigation  
7 consulting been a part of the business of Consensus  
8 Point?

9 A. How long?

10 Q. Yes.

11 A. It's not part of our normal portfolio.

12 Q. How frequently would you say Consensus  
13 Point engages in litigation consulting?

14 A. My experience personally, never.

15 Q. Never. Okay. All right. When did you  
16 join Consensus Point?

17 A. A little over four years ago.

18 Q. And what is your current position there?

19 A. Vice president of sales.

20 Q. And have you always held that position  
21 with Consensus Point?

22 A. Yes.

23 Q. Do you know when Consensus Point was  
24 founded?

25 A. A dozen years ago roughly.

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1 Q. And you graduated in 1977 from Pace  
2 University, right?

3 A. No.

4 Q. Or I'm sorry. No. Wrong note.  
5 You do not have a law degree; is that  
6 correct?

7 A. I do not.

8 Q. And you don't have any degrees in  
9 marketing; is that right?

10 A. I have an undergraduate degree in business  
11 administration with a concentration in marketing.

12 Q. Okay. So your degree had a concentration  
13 in marketing. Do you have any separate specialized  
14 training in market research?

15 A. 28 years' experience.

16 Q. But no special certifications or training  
17 that you've done separate from your work experience?

18 A. No.

19 Q. Now you did not include a copy of your  
20 resume with your report, correct?

21 A. I did not.

22 Q. All right. Have you ever offered an  
23 expert report in any piece of litigation prior to  
24 this one?

25 A. No.

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1 Q. Okay. All right. I'm going to turn to  
2 Page 2 of your report to Section B, Qualifications,  
3 which kind of goes through your experience and  
4 history. You mentioned already that you --

5 A. Uh-huh.

6 Q. -- have 28 years of experience in market  
7 research.

8 A. Correct.

9 Q. And none of that is in the context of  
10 litigation, correct?

11 A. Correct.

12 Q. Looking through your prior employment  
13 history, you first list on Page 3, Paragraph 4(a)  
14 Intengo. Am I saying that correct?

15 A. Uh-huh.

16 Q. And you said you were a solutions  
17 architect, correct?

18 A. Correct.

19 Q. And Intengo is a marketing research firm.  
20 Is it similar to Consensus Point?

21 A. If the fact that they are both marketing  
22 research firms makes them similar, yes.

23 Q. How would you consider them different?

24 A. They are different companies. They're  
25 different organizations.

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1 management proper, but the opportunity to be able to  
2 work with independent bottlers across multistate  
3 areas to implement sales and marketing programs.

4 Q. So any market research activity at  
5 Pepsico?

6 A. No.

7 Q. No. Okay. And then, finally, you also  
8 list a position at The Quaker Oats Company titled  
9 planning manager.

10 What was the scope of your position there?

11 A. I had multiple positions at Quaker.

12 Q. Yeah.

13 A. I mean, you're talking in the way back  
14 machine. Like early entry sales. Sales planning and  
15 brand management.

16 Q. And no --

17 A. No.

18 Q. No market research?

19 A. No.

20 Q. And just to confirm, all of the positions  
21 that we just went through from Page 3 of your report,  
22 no work in litigation consulting --

23 A. Huh-uh.

24 Q. -- or litigation analytics there, correct?

25 A. No.

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1 research firm should subscribe. They do lay out  
2 rules of conduct for the industry --

3 Q. Can you --

4 A. -- the same way that --

5 Q. I'm sorry?

6 A. -- the ABA just defines what you do and  
7 how you do your work, I'm sure.

8 Q. Can you spell CASRO for me.

9 A. C-A-S-R-O.

10 Q. C-A-S-R-O. That's what I thought.

11 Okay. Have you ever performed a consumer  
12 confusion analysis outside of litigation?

13 A. What is a consumer confusion analysis?

14 Q. Have you performed a study examining  
15 whether consumers would be confused between two  
16 products outside of litigation?

17 A. Confused?

18 Q. As to the origin, for example.

19 A. The origin?

20 Q. The --

21 A. I mean, none of this is making any sense  
22 right now.

23 Q. So have you ever designed or analyzed a  
24 study examining whether consumers would be confused  
25 as to the origin of one product or another based on

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1 their branding or any kind of packaging design?

2 A. You mean where it was produced and where  
3 it came from?

4 Q. Correct.

5 A. And I can't understand why you would ever  
6 need something like that. Why would the consumer  
7 care where it was manufactured.

8 Q. How about the company behind the product,  
9 not necessarily the manufacturer?

10 A. Trying to understand if people know who  
11 made it?

12 Q. For example, if you see a bottle with of  
13 Tide and you see a bottle of All on the laundry  
14 detergent aisle, have you ever done a study examining  
15 whether consumers know both come from Proctor &  
16 Gamble or from two different sources?

17 A. No.

18 Q. Okay. Have you ever analyzed the concept  
19 of dilution outside of litigation?

20 A. Define dilution.

21 Q. Whether or not the use of a mark would  
22 have the tendency to dilute the brand strength of  
23 another trademark owner.

24 A. The use of a mark?

25 Q. A trademark.



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1 A. Can you rephrase that question.

2 Q. Sure. Have you ever analyzed whether the  
3 use of a brand name would have a tendency to dilute  
4 the strength of another brand name owned by a  
5 competitor?

6 A. No.

7 Q. Okay.

8 A. Not that I can recall.

9 Q. As far as the surveys run by Consensus  
10 report, are they done primarily in-house; or do you  
11 utilize third-party firms to run the surveys for you?

12 MR. JONES: Objection to the form of the  
13 question.

14 Q. (By Ms. Besl) You can answer.

15 A. I don't understand your question.

16 Q. Sure. So as to the source of the surveys,  
17 did Consensus Point design all their own surveys  
18 in-house?

19 A. Do we design our surveys?

20 Q. Yes.

21 A. Yes. We do.

22 Q. Okay. And do you conduct the surveys  
23 in-house?

24 A. Definitely conduct.

25 Q. Do you actually send out -- Let's say,

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1 discussed when in engaging in survey research,  
2 correct?

3 A. Right.

4 Q. Have you ever heard of Lanham,  
5 L-A-N-H-A-M?

6 A. No.

7 Q. Have you ever heard of Professor Thomas  
8 McCarthy?

9 A. No.

10 Q. Have you ever heard of Shari Diamond?

11 A. No.

12 Neil Diamond's daughter?

13 Q. I don't think so.

14 Have you ever heard of Professor  
15 McCarthy's treatise, "McCarthy on Trademarks..."?

16 A. No.

17 Q. Aside from CASRO, are there any other  
18 sources in the industry you would rely upon in  
19 designing a survey?

20 A. They don't necessarily give you guidance  
21 on design. It is more best demonstrated practices.

22 Q. So are there any other sources you rely  
23 on -- upon in determining best --

24 A. That's the --

25 Q. -- demonstrated practices?

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1 here, if you want.

2 Q. No. No need. No need.

3 All right. And then do they have a  
4 website for the organization that you're aware of?

5 A. Yes.

6 Q. Perfect. Thank you. All right. I think  
7 I thought it was a K.

8 A. No. It's with a C.

9 Q. Thank you.

10 A. Your guy should know it, too. He will.

11 Q. All right. Going back to the survey  
12 methodology, would you agree that the use of a  
13 control test panel is a necessary element of a proper  
14 survey?

15 A. Not always.

16 Q. And when is it not necessary?

17 A. If you are -- If you're testing multiple  
18 environments and the impact of one specific issue on  
19 another, then, yes, a test control.

20 If you're merely seeking knowledge and  
21 understanding of behavioral patterns or attitudinal  
22 patterns, there's no reason for a control.

23 Q. And on what basis do you make that  
24 statement?

25 A. 28 years of experience.

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1 Q. So is this part of the CASRO --

2 A. I can't tell you --

3 Q. -- guidebook?

4 A. I don't -- I can't quote chapter and  
5 verse out of their guidebook.

6 Q. Okay. And when I say guidebook, I'm just  
7 referring -- You mentioned there was a compendium of  
8 information --

9 A. Uh-huh.

10 Q. -- that would dwarf your report, you said?

11 A. Yes.

12 Q. And is --

13 A. Uh-huh.

14 Q. -- that understood?

15 Okay. Thank you. In the context of  
16 litigation surveys, surveys offered for the purpose  
17 of giving opinions in the litigation, do you have any  
18 opinion as to whether a control's considered to be  
19 necessary in those cases?

20 A. No, because I have not done any others  
21 than this.

22 Q. I asked you earlier about a gentleman  
23 named McCarthy and a treatise on McCarthy on  
24 trademarks. Would it surprise you to learn that  
25 McCarthy has been quoted as stating that without a

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1 control, you cannot show that consumer beliefs are  
2 attributed to the challenged advertisement and not  
3 due to some other source?

4 MR. JONES: Objection to the form of the  
5 question.

6 Q. (By Ms. Besl) If you understand, you can  
7 answer.

8 A. I have no reason that it would surprise  
9 me, 'cause I have not heard it before.

10 Q. Do you agree with the statement that a  
11 control is necessary --

12 A. I don't understand the context in which  
13 you made a statement.

14 Q. Let me give you the full quote.

15 One who uses a consumer perception survey  
16 without a control probably cannot show that consumer  
17 beliefs are attributable to the challenged  
18 advertisement and not due to some other source.

19 Do you agree with --

20 A. If you're --

21 Q. -- that statement?

22 A. -- doing a test control for the impact of  
23 advertising, he's correct.

24 This is not an advertising test.

25 Q. You don't consider the survey you

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1 conducted to be a review of advertisement on  
2 packaging?

3 MR. JONES: Objection to the form of the  
4 question.

5 Q. (By Ms. Besl) If you understand, you can  
6 answer.

7 A. I don't understand.

8 Q. Your survey examines statements on the  
9 packaging of different products; is that correct?

10 A. Yes.

11 Q. And would you not consider those  
12 statements to be advertising on the part of the --

13 A. In its simplest form.

14 Q. But you would still disagree that a  
15 control was not necessary for a survey of your type?

16 A. If --

17 MR. JONES: Object to the form of the  
18 question.

19 Can I hear that question back, please.

20 (Whereupon, the record was read by the  
21 reporter as requested.)

22 MR. JONES: Okay. I've heard enough.  
23 That's why I objected.

24 Q. (By Ms. Besl) Okay. If you understand  
25 the question, you can answer.

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1 A. Rephrase.

2 Q. Sure. You would agree that the statements  
3 that you analyzed on the products at issue, are  
4 advertising on the packaging, correct?

5 A. Correct.

6 Q. And you would agree that in an  
7 advertisement study, a control would be necessary,  
8 correct?

9 A. If you're testing the impact of change in  
10 advertising, yes.

11 Q. But not the --

12 A. If you're evaluating the change in  
13 behavior as a result of the advertising, yes.

14 There was no change. No control  
15 necessary.

16 Q. Okay.

17 A. There's no altered reality out there.

18 Q. What do you mean by altered reality?

19 A. That's what your friends appears to be  
20 talking about is an altered reality.

21 Q. What do you mean by altered reality?

22 A. Do you buy that 'cause it's got a blue  
23 label?

24 Now if it's a green label, would you buy  
25 it?

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1 Q. And you're --

2 A. That's a change in reality. I mean --

3 Q. So for example --

4 A. -- that's where you need. Like we would  
5 potentially need a control.

6 Q. Okay.

7 A. I'm looking at a static environment in  
8 which no change is possible.

9 Q. Okay. So you have used controls before in  
10 surveys that you have run for customers; is that  
11 correct?

12 A. New product concept testing, I generally  
13 almost always use a control. It's important.  
14 Otherwise, you can end up with the tallest midget on  
15 the tree.

16 Q. Did you discuss potentially having a  
17 control for this survey offered in this case?

18 MR. JONES: And objection to form of that  
19 question.

20 I instruct you not to answer to the extent  
21 that it involves discussions with counsel; but  
22 at this point, it's a yes-or-no question. I  
23 just don't want to you disclose any discussion  
24 with counsel.

25 THE WITNESS: No.



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1 Q. Yeah. That's fine.

2 A. And B is --

3 Q. And you can do B.

4 A. And B is the other one. Okay.

5 Q. Yeah. I just wanted to try and shorten  
6 it.

7 A. Yeah. That's fine.

8 (Discussion ensued off the record.)

9 Q. (By Ms. Besl) Wouldn't you agree that for  
10 surveys in litigation, it's accepted practice to  
11 start that -- a survey with an open-ended question  
12 rather than a close-ended question?

13 A. I have no comment.

14 Q. So you wouldn't --

15 A. I have no experience in litigation, so I  
16 can't answer your question.

17 Q. Did you do any kind of research in  
18 preparing the study, given that it was focused on  
19 litigation which you had not done before?

20 A. No.

21 Q. So you mentioned earlier that Question 8  
22 did not allow the respondents to select more than one  
23 answer, correct?

24 A. Correct.

25 Q. So if a Respondent believed that both of

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1 adhesive --

2 A. Uh-huh.

3 Q. -- based on the packaging itself?

4 A. Uh-huh.

5 Q. Okay. All right.

6 A. As a consumer.

7 Q. All right. In your report on Page 9,  
8 Paragraph 12, you state that, "The survey data  
9 indicates that consumers understand that an epoxy  
10 adhesive has a particular chemical composition,  
11 namely, an epoxy resin"; is that correct?

12 A. Yes.

13 Q. Where in either Options A or B does epoxy  
14 resin refer to a particular chemical composition?

15 MR. JONES: Objection to the form of the  
16 question.

17 Q. (By Ms. Besl) You can answer.

18 A. Can you try that one again.

19 Q. Sure. Where in Question 8 in the wording  
20 of Options A and B does it state that epoxy resin is  
21 referring to a particular chemical composition?

22 A. It states it in B. There's the word  
23 "chemicals" in there.

24 Q. But it doesn't use the word "epoxy resin"  
25 in relation to chemicals, correct?

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1 A. Not from what I'm seeing in those words.

2 Q. And, in fact, that Option B where it  
3 references chemicals, only 19 percent of people  
4 selected that, correct?

5 A. That's what the data is telling us.

6 Q. Okay. The words "chemical composition"  
7 don't appear anywhere in your survey, do they?

8 A. Not that I see.

9 Q. Are you aware of a single open-ended  
10 written response from one of the respondents  
11 referencing chemical composition in your survey?

12 You can start with Question 8 here.

13 A. I've not gone through all the open-ended  
14 responses. That's not a no. That's an I don't know.

15 Q. Okay. And you included all of the  
16 open-ended responses as Exhibit D to your survey, is  
17 that right?

18 A. That should be in the exhibit. Yes.

19 Q. Are you aware of a single open-ended,  
20 written response from a respondent to Question 8  
21 referencing the word "chemical"?

22 A. I am not.

23 Q. So on what basis did you assume that a  
24 response related to epoxy resin equates with a  
25 chemical composition in Question 8?

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1 A. And they're chemicals.

2 Q. Do you understand that an --

3 A. And you put them together. That's a  
4 composition.

5 Q. So your understanding is that epoxy resin  
6 refer to a chemical?

7 A. If you're going to get technical with me  
8 on chemicals, I'm not answering it, 'cause I don't  
9 know what your question is so --

10 Q. In coming to your conclusion in giving  
11 your opinion that an epoxy adhesive is understood by  
12 consumers to have a particular chemical composition,  
13 what do you understand an epoxy resin to describe?

14 A. I'm not sure I understand your question.  
15 I'm sorry. I don't want to sound dense, but --

16 Q. No. No.

17 A. -- it sounds like you're asking me to be a  
18 chemist.

19 Q. Not at all.

20 A. And I am not.

21 Q. Not at all. I'm just trying to  
22 understand. You offered two alternatives to  
23 consumers to select the best answer. The result of  
24 your survey state that 70 percent of those selected  
25 Option A which refers to a two-part adhesive system

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1 combining an epoxy resin with a hardener, correct?

2 A. Correct.

3 Q. And there's no reference to an epoxy resin  
4 being a specific chemical composition in that option,  
5 correct?

6 A. That's correct.

7 Q. And you conclude that that answer and the  
8 results lead to a conclusion that an epoxy adhesive  
9 has a particular composition, namely, an epoxy resin;  
10 is that correct?

11 A. Yes.

12 Q. So my question is: Given that conclusion,  
13 what is it your understanding of the words "epoxy  
14 resin" were supposed to convey to the respondents in  
15 the survey?

16 A. You have two things in here. They're a  
17 chemical, and you have to put them together to make  
18 them work. That's a chemical composition.

19 Q. Okay.

20 A. Is it not?

21 Q. Is that something that you were told to  
22 use in the survey, the wording "epoxy resin"?

23 MR. JONES: And objection to the extent  
24 that that calls for disclosure of  
25 attorney-expert communications.

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1 A. Uh-huh. Yes, ma'am.

2 Q. Did you do any investigation into whether  
3 an epoxy resin can chemically be something other than  
4 an epoxy ring chemistry?

5 A. I don't know what a epoxy ring chemistry  
6 means.

7 Q. So did you do any investigation into epoxy  
8 ring chemistry in formulating your survey?

9 A. I don't know what it is, so I don't know  
10 why I should investigate it.

11 Q. So you have no idea whether an epoxy resin  
12 could consist of a urethane chemistry, correct?

13 A. I'm not a chemist.

14 Q. And you have no idea whether an epoxy  
15 resin could consist of a methyl methacrylate  
16 chemistry, correct?

17 A. I'm not a chemist.

18 Q. Okay. So that's a no?

19 All right. Did any of your questions in  
20 your survey specifically ask the respondents about  
21 whether or not an epoxy resin has a specific type of  
22 chemistry to it?

23 A. No.

24 Q. All right.

25 A. Do you really think they care at the end

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1 of the day if it takes two things, you put it  
2 together, and it stays there? They're happy.

3 MS. BESL: You would know better than I.

4 All right. And then I think that's it for  
5 me. So thank you very much.

6 MR. JONES: Just one final question.

7 FURTHER EXAMINATION

8 BY MR. JONES:

9 Q. I think you basically testified to a few  
10 questions just then about your knowledge of  
11 chemistry. Do you consider yourself a chemistry  
12 expert?

13 A. Absolutely not.

14 Q. For the purpose of this case, do you  
15 consider yourself a survey expert?

16 A. Yes.

17 Q. All right.

18 A. Chemistry was one of the courses as a  
19 junior in high school. Come on.

20 MR. JONES: All right. No further  
21 questions.

22 MS. BESL: We're all done. So I'm  
23 guessing you're going to read.

24 MR. JONES: We will reserve reading and  
25 signing.